BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HONGLOAN NGUYEN	)	
Claimant	)	
V.	)	
	)	
MARTIN INTERCONNECT	)	
Respondent	)	Docket No. 1,071,794
AND	)	
	)	
EMPLOYERS PREFERRED INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the July 15, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Dennis L. Phelps of Wichita, Kansas, appeared for claimant. Brandon A. Lawson of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 25, 2015, preliminary hearing and exhibits thereto; the transcript of the July 7, 2015, deposition of claimant; the transcript of the July 7, 2015, deposition of MyLinh Nguyen; and all pleadings contained in the administrative file.

ISSUE

Claimant alleges she sustained neck, right shoulder and right arm injuries by repetitive trauma up to and including August 22, 2014, which she asserts is the last day she worked for respondent.

Respondent asserts claimant's date of injury by repetitive trauma was June 23, 2014, her last day worked. On that day, claimant was taken off work by a physician due to her right shoulder condition. Respondent alleges it terminated claimant's employment on July 7, 2014.

The parties stipulated claimant first provided respondent notice of her injury by repetitive trauma on September 2, 2014.

The ALJ ruled:

> The Court finds that the Claimant's last day of work for the Respondent was June 23, 2014. That was the last date she actually worked for the Respondent before being terminated on July 7, 2014. The fact that the Claimant applied for unemployment benefits and a notice dated August 5, 2014, was sent to the Respondent corroborates Mr. Costello's testimony that the Claimant was terminated on July 7, 2014, and was informed of the termination later in July.
>
> The Claimant going to the Respondent's facility on August 21, 2014, and performing work without being employed by the Respondent does not qualify as working for the Respondent. June 23, 2014, is found by the Court to be [the] date of accident under K.S.A. 44-508(e)(4).
>
> The Claimant's notice given on September 2, 2014, was not within 10 days of June 23, 2014. Therefore, the notice was not timely.[1]

The issues are:

1. What is the date of injury by repetitive trauma?

2. Did claimant provide timely notice of her injuries to respondent?

FINDINGS OF FACT

Claimant, who is Vietnamese and requires an interpreter, began working for respondent in 2007 or 2008, performing wire assembly work. Claimant would push and pull 60 to 120 wires, 20 to 30 feet long, through a plastic cable ranging from ½ inch to 2 inches in diameter. After that task is performed, several of the wires encased in plastic cable are taped together into a 3-inch bundle. Claimant then pulled the bundle to another work station.

In 2013, claimant's right shoulder began hurting and worsened in 2014. On April 23, 2014, claimant sought treatment at Hunter Health Clinic. Claimant testified that on April 22, 2014, she reported her shoulder was hurting to Chau Nguyen, her supervisor, but claimant did not know why her shoulder hurt and did not claim workers compensation. Claimant was provided a slip by Hunter Health restricting her from lifting more than ten pounds, which she averred she provided respondent. Claimant indicated no physician at Hunter Health indicated her shoulder condition was work related. Hunter Health records indicate claimant reported her right shoulder hurt and she had an increase in pain and a decrease in function after working at her job repetitively lifting 40 to 50 pounds. Claimant was prescribed Ibuprofen.

---

[1] ALJ Order at 3.

Claimant continued performing the same repetitive job tasks, but worked with lighter wires. Claimant testified her right shoulder pain persisted while working. She returned to Hunter Health on June 23, 2014, and was taken off work by the doctor, but was not advised her right shoulder condition was work related. Claimant indicated she took the off-work restriction to respondent.

Hunter Health records indicate claimant was seen on June 13, 2014. The report indicates claimant's right shoulder symptoms worsened despite being assigned light duty. Claimant was prescribed a Lidocaine patch and medications. A right shoulder MRI was recommended and a note states that "Pt agrees to pay and refuses to submit as work comp."[2] June 23 Hunter Health records verified claimant was taken off work.

Claimant again went to Hunter Health on August 1, 2014. Notes from that visit indicate the plan was to send claimant to Back to Action to determine her physical limitations, but she refused and requested to be released to return to work.

Claimant indicated she again went to Hunter Health on August 20 and was given a slip to return to work with restrictions pending an FCE and took the slip to Chau. Claimant testified that the next day, August 21, 2014, she returned to work, clocked in and performed her wiring activities. Her right shoulder pain worsened, but she returned to work on August 22 and clocked in. During the day, she was called into the office by Chau and Chris Costello, who handles respondent's human resources matters, and told to go home because she violated company policy on turning in the doctor's slip.

According to claimant, she attempted to call respondent on August 25 and 27, 2014, using an interpreter, but received no response. On August 28, Mr. Costello told claimant, through the interpreter, that she was fired. Claimant asked why she was being terminated, but Mr. Costello would not reply.

Mr. Costello testified that in April 2014, claimant indicated she injured her shoulder, but did not bring him a doctor's restrictions or tell him the injury was work related. Mr. Costello indicated he asked claimant many times during May and June 2014 to provide respondent with her restrictions. Claimant did not provide them until mid-July 2014. Mr. Costello indicated he was not aware a doctor had taken claimant off work on June 23 and was not provided any paperwork concerning that visit. To Mr. Costello's knowledge, claimant never spoke to anyone at respondent about that visit.

According to Mr. Costello, claimant never returned to work after June 23, 2014, and on July 7, 2014, he completed, dated and signed an Employee Termination form indicating claimant last worked on June 22, 2014. The form stated, "Hongloan Nguyen was

[2] P.H. Trans., Cl. Ex. 6.

terminated on 7/7/2014 for attendance issues. Based on our company attendance policy Hongloan voluntarily terminated her employment with MIS."[3]

Mr. Costello testified claimant was a no call/no show for two days in a row and he was shocked and surprised because she had worked for respondent for seven years and then suddenly missed work. He went to claimant's direct supervisor, Chau, and asked Chau if she heard from claimant. When Chau said no, Mr. Costello finalized claimant's termination.

In early August 2014, respondent received an Employer Notice from the Kansas Department of Labor indicating claimant filed for unemployment benefits. Mr. Costello completed the employer's section of the form, indicating claimant's last day of work was June 20, 2014, and she was terminated on July 7, 2014. He indicated on the form respondent was not contesting the claim or providing additional information. Mr. Costello admitted he did not send claimant a written notification she had been terminated. He testified that on many occasions during July 2014, he informed claimant, through an interpreter, that she had been terminated.

On November 17, 2014, Mr. Costello prepared a written history of events of claimant's workers compensation claim. The history indicates that in late-May 2014, claimant reported she injured her right shoulder. In the history, Mr. Costello told claimant she should bring in her restrictions and respondent would honor them. He stated she was asked numerous times in June 2014 to bring in her restrictions, but she did not. Claimant stopped coming to work on June 23, 2014. Mr. Costello was surprised that claimant stopped by respondent the week after she was terminated to turn in medical notes for her absences. The history indicated Mr. Costello told claimant she was terminated and she asked if she should apply for unemployment benefits. Mr. Costello testified that when claimant stopped by the office, she brought her friend, an interpreter. In the history, Mr. Costello stated he should have contested claimant's unemployment claim, but did not do so because of her years of service with respondent.

On cross-examination, Mr. Costello acknowledged claimant had no attendance issues in the seven years she worked for respondent. He also agreed that he would not know if Chau received documents from claimant, but did not forward those on. When asked if claimant worked on August 21, 2014, Mr. Costello testified:

> She was there, but she wasn't supposed to be. That's when I talked to her that she needed to go home. She never even came and talked to me or let me know that she was coming back to work. . . . I felt bad that she was there half a day, but she wasn't cleared to come back to work or to even be rehired at that time.[4]

---

[3] *Id.*, Resp. Ex. 1.

[4] *Id.* at 50-51.

Mr. Costello testified claimant could not clock in because respondent had installed a new biometric system requiring employees to use their fingerprints and claimant did not have her fingerprints taken.

MyLinh Nguyen testified she is fluent in English and Vietnamese and translates for Vietnamese people and helps them complete forms. In the past, MyLinh has assisted claimant with translation of documents and letters. She testified she was shown the June 23, 2014, off-work slip by claimant and on that same day, she and claimant went to Mr. Costello's office. MyLinh testified she gave the off-work slip to Mr. Costello and they spoke of several issues concerning claimant. Later, Chau came to the office and was involved in the conversation.

Claimant's attorney informed MyLinh of Mr. Costello's testimony that on many occasions during July 2014, Mr. Costello informed claimant, through an interpreter, that she had been terminated. MyLinh denied being at any such conference.

MyLinh testified that on August 25, 2014, she and claimant went to see Mr. Costello. According to MyLinh, claimant was told by Mr. Costello that she would be paid for working on August 21, and to call back in a couple of days because he needed to check with the owner to see if claimant was going to be terminated or allowed to return to work. MyLinh made several telephone calls to respondent in the following days, but got no response. About two days later, MyLinh heard from claimant that she was terminated.

MyLinh testified she served as an interpreter for other employees of respondent. She spoke to them and Chau and learned respondent used two time clocks on the day claimant worked in August, an old one and the new electronic time clock. MyLinh said she was told by claimant and Chau that when claimant came back to work on August 21, claimant was told she could use the old time clock.

In a July 7, 2015, deposition, claimant testified she clocked in and out in the morning and afternoon of August 21, 2014. Each time she clocked in or out, she used a card that she inserted into the time clock. Claimant indicated that when she returned to work on August 21, Chau told her to work "as normal."[5] Claimant indicated that before she returned to work on August 21, no one from respondent told her she was terminated. Claimant denied Mr. Costello's assertion he told her many times in July, through an interpreter, that she was terminated. According to claimant, MyLinh was the only interpreter she used when dealing with respondent.

[5] Claimant Depo. at 6.

Claimant testified that in early August 2014, a man by the name of Ken Nguyen helped her try to get unemployment benefits. She testified Ken "told me that based on the information that I provide because of the illness, I am not qualified for unemployment . . . ."[6]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[8]

K.S.A. 2014 Supp. 44-508(e) provides:

> "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

---

[6] *Id.*

[7] K.S.A. 2014 Supp. 44-501b(c).

[8] K.S.A. 2014 Supp. 44-508(h).

K.S.A. 2014 Supp. 44-520(a)(1)(C) requires notice be given, "if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer."

K.S.A. 2014 Supp. 44-520(c) states that "[f]or the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included."

The last day claimant worked for respondent is her date of injury by repetitive trauma. If one believes Mr. Costello, claimant was terminated on July 7, 2014, and her last day worked was June 20 or 23, 2014. On the other hand, if claimant and MyLinh are more credible, then August 22, 2014, was claimant's last day worked.

At work, claimant primarily dealt with her supervisor, Chau, who, like claimant, is Vietnamese. Claimant indicated she brought her written restrictions to Chau in April 2014 and on June 23, 2014. MyLinh, whom claimant exclusively used to interpret for her with respondent, testified she accompanied claimant when she delivered the written off-work restriction to Mr. Costello on June 23.

This Board Member finds MyLinh's testimony convincing. MyLinh testified she never had any conferences in July 2014 with Mr. Costello and claimant wherein Mr. Costello told claimant she was discharged. MyLinh also testified about the August 25 conference, wherein Mr. Costello indicated he would have to check to see if claimant was being terminated.

Several facts cast doubt on respondent's version of events. Claimant had no attendance issues until June 23, 2014, when, according to respondent, she suddenly stopped showing up for work. One would think respondent would have attempted to contact claimant to ascertain why she was not coming to work. Mr. Costello discharged claimant on July 7, 2014, but never sent her a termination notice or attempted to contact her to let her know she was terminated. Mr. Costello's testimony that he contacted claimant many times in July 2014 through her translator that she was discharged is not believable. As mentioned above, MyLinh and claimant disputed that fact. Mr. Costello did not testify about the context of those conversations, including why he had so many conversations with claimant.

This Board Member finds it extremely unusual that on August 21, 2014, Chau allowed claimant to work the entire day even though she was previously terminated. It is also curious that Mr. Costello apparently never discovered claimant was working until August 22, when he told her to go home. If claimant was discharged on July 7, one would think she would have been turned away when she attempted to work on August 21.

In making his decision, the ALJ relied heavily on the fact that claimant, prior to returning to work on August 21, filed for unemployment benefits. However, little evidence was presented concerning claimant's filing for unemployment benefits. Only the Employer

Notice was placed into evidence. Claimant was not asked what information she provided on her unemployment application concerning her employment at respondent. Moreover, it is unusual respondent would not contest claimant's entitlement of unemployment benefits when she allegedly voluntarily ended her employment.

This Board Member finds claimant's last day worked was August 22, 2014, and, therefore, she provided timely notice of her injury by repetitive trauma on September 2, 2014.

K.S.A. 2014 Supp. 44-520(c) provides that weekends are to be included in the 10-day notice period. September 2, 2014, is 11 days after claimant's date of injury by repetitive trauma. September 1, 2014, was a holiday, Labor Day. K.S.A. 2014 Supp. 44-520 is silent on whether holidays are included when calculating the 10-day notice period.

Prior to the 2011 amendments to the Workers Compensation Act, K.S.A. 44-520 did not contain a provision that included weekends in the 10-day notice period. This Board Member believes that if the Kansas Legislature intended legal holidays to be included in the 10-day notice period, it would have included such language in K.S.A. 2014 Supp. 44-520(c).

In *McIntyre*,[9] the Kansas Court of Appeals determined that when the Act was silent on how the days for notice are calculated, K.S.A. 60-206 applies. K.S.A. 2014 Supp. 60-206 (a)(1)(C) provides that when a statute does not specify a method of computing time, the period is stated in days or longer, and the last day of the period falls on a Saturday, Sunday or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday or legal holiday. Since K.S.A. 2014 Supp. 44-520(c) is silent on whether holidays are included in the 10-day notice period, K.S.A. 2014 Supp. 60-206 applies. September 1, 2014, Labor Day, is not used to calculate the 10-day notice period in K.S.A. 2014 Supp. 44-520, because it is a legal holiday and fell on the last day of claimant's 10-day notice period.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

---

[9] *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

[10] K.S.A. 2014 Supp. 44-534a.

[11] K.S.A. 2014 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member reverses and remands the July 15, 2015, preliminary hearing Order entered by ALJ Jones with directions to address the remaining issues raised by the parties at the preliminary hearing.

IT IS SO ORDERED.

Dated this ____ day of October, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
phelpsden@aol.com

Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier
blawson@evans-dixon.com

Gary K. Jones, Administrative Law Judge